

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
NCE MX Group 430)	
)	
Marfa Public Radio)	
)	
Application for a Construction Permit for a New)	File No. BNPED-20071017AEC
NCE-FM Station at Marfa, Texas)	Facility ID No. 174131
)	
Houston Christian Broadcasters)	
)	
Application for a Construction Permit for a New)	File No. BNPED-20071018AJM
NCE-FM Station at Alpine, Texas)	Facility ID No. 173348

MEMORANDUM OPINION AND ORDER

Adopted: April 13, 2016

Released: April 14, 2016

By the Commission: Commissioner Pai issuing a statement.

1. We have before us an Application for Review (AFR) filed by Marfa Public Radio (MPR) seeking Commission review of a Media Bureau *Staff Decision*¹ that granted an application of Houston Christian Broadcasters (HCB) to construct a new noncommercial educational (NCE) FM station at Alpine, Texas.² After refusing to set aside the Commission's application of its established point system criteria and concluding that the mutually exclusive HCB application was comparatively superior to that of MPR for a new NCE FM station at Marfa, Texas,³ the *Staff Decision* dismissed MPR's application. For the reasons discussed below, we deny the AFR.

2. The *Staff Decision* rejected MPR's argument that HCB should be disqualified, for lack of candor/misrepresentation and for its failure to timely amend, because HCB allegedly concealed and/or failed for seven years to report that HCB had no assurance of the availability of its proposed transmitter site, since MPR acquired that tower in 2008.⁴ The Bureau observed that HCB had obtained reasonable assurance from Matinee Radio, LLC (Matinee), the previous owner of the tower, in 2007, and that the Commission's antenna structure registration system continued to reflect Matinee's ownership until June 2015, when MPR belatedly updated the registration of the tower it had acquired. MPR filed a Petition to Deny the HCB application.⁵ In that Petition, MPR advised HCB that it had decided not to honor Matinee's previous commitment to HCB to make the site available to it for the facility specified in HCB's Alpine application. It thus raised misrepresentation/lack of candor, abuse of process and Section 1.65

¹ *MX Group 430*, Letter Order (MB Nov. 17, 2015) (*Staff Decision*).

² The AFR was filed on December 17, 2015. HCB filed an Opposition on January 4, 2016. MPR filed a Reply on January 11, 2016.

³ *Staff Decision* at 2, citing *Comparative Consideration of Seven Groups of Mutually Exclusive Applications to Construct New or Modified Noncommercial Educational FM Stations*, Memorandum Opinion and Order, 30 FCC Rcd 5161, 5171 (2015).

⁴ *Staff Decision* at 4-5.

⁵ Petition to Deny filed by Marfa Public Radio (filed Jun. 10, 2015) (Petition).

issues against HCB for its failure to have amended its application to report the non-availability of the site to it.⁶ The Bureau found no evidence that HCB previously knew that its site assurance was no longer valid. For example, the record did not reflect that anyone, including MPR itself, had previously revoked the reasonable assurance consent to HCB given by Matinee or had otherwise provided notice to HCB that the tower would be unavailable.⁷ Accordingly, it denied the Petition.

3. MPR contests the *Staff Decision*'s findings that HCB's professed unawareness of site loss until shortly before amending its application to specify a new site in July 2015 was reasonable, and that the record contained no evidence that HCB intentionally concealed or had motive to conceal a site loss. MPR contends that the Bureau erred because HCB had motive to conceal its loss of the site in order to obtain favorable action on its application.⁸ Notwithstanding Matinee's consent to HCB, MPR argues that HCB should have known through exercise of due diligence that the tower's ownership had changed because the tower has been used by another Marfa, Texas station, KRTS(FM), and information about the 2008 assignment to MPR of KRTS from Matinee, its former licensee, appeared in public notices, the Commission's Daily Digest, and unspecified news reports. MPR also claims that MPR's competing application should have alerted HCB to the change in tower ownership because MPR's application disclosed the proposed sale of KRTS and specified the same tower as HCB's proposal.⁹

4. We deny the AFR for the reasons stated in the *Staff Decision*. The Bureau properly found that the record presented no question of concealment¹⁰ and that HCB's inaction did not violate

⁶ *Id.* at 5.

⁷ *Id.* at 4-5.

⁸ AFR at 5-6.

⁹ AFR at 6. MPR's Petition made no reference to Matinee, the original owner of the tower, stating only that the tower "is owned and controlled by MPR," that "MPR has never given any assurance or authorization to HCB" to specify the tower, and that "MPR is not prepared to grant HCB such authorization." Petition at 3, Declaration of MPR General Manager Tom Michael (dated Jun. 10, 2015). In response, HCB showed that, before filing its Alpine application, it had obtained written reasonable assurance from Matinee dated October 15, 2007 (provided as Attachment C to the HCB Opposition to Petition to Deny), that HCB had not received any notice from any party that the permission had been rescinded prior to the MPR Petition, and that MPR had not notified the Commission of the change in tower ownership, as required by 47 CFR § 17.57, until June 6, 2015, more than seven years after MPR had acquired the tower from Matinee. Houston Christian Broadcasters Opposition to Petition to Deny (filed Jun. 19, 2015) at 2. In its Reply, MPR generally criticized HCB for lack of diligence and failing to update its application, but made none of the specific factual claims involving alleged lack of diligence that are presented in the AFR. Reply of Marfa Public Radio (filed Jun. 29, 2015) at 2.

¹⁰ MPR, while claiming that HCB had motive to conceal a site loss for seven years in order to achieve favorable action on its application, does not explain its apparent belief that the Commission would have viewed a site amendment unfavorably had HCB learned of a site loss in 2008 and amended at that time. MPR cites cases with substantially different facts, in which the Commission rejected late-filed site amendments or supplements necessitated by an applicant's own lack of diligence. See *Royce Int'l Broad. Co. v. FCC*, 820 F.2d 1332, 1336-37 (D.C. Cir. 1987) (upholding, under standards applicable to traditional comparative hearings, Commission's non-acceptance of late-filed amendment for lack of diligence where need to amend was caused by applicant's supplying incomplete information and filing corrective information at the wrong FCC location); *Heartland Ministries, Inc.*, Letter Opinion, 25 FCC Rcd 3572, 3574-75 (MB 2011) (failure to obtain timely consent from a Channel 6 TV station does not provide good cause for late-filed supplement). An involuntary loss of a proposed site generally provides good cause to amend. See *Praise Broad. Network, Inc.*, Order, 13 FCC Rcd 1270, 1272, para. 5 (OGC 1996) (*Praise*) (accepting site change amendment and rejecting as "speculation and surmise" an allegation that an applicant's general partner, as a resident of the area and a realtor, must have known that the proposed site had been sold for construction of new homes and/or should have checked on site's continued availability). HCB amended to a new site in 2015, soon after learning from MPR's Petition that the original site was no longer available. The Bureau appropriately accepted the amendment and there is no reason to believe it would have done otherwise with an earlier-filed amendment.

Section 1.65 where HCB's professed belief that it continued to have permission granted by the then-current owner of the tower was consistent with ownership information in the tower registration system and there was no indication that consent to its use of the tower had been revoked.¹¹ It is a site owner's prerogative to sell or to reconsider availability at any time, but a party unaware of any such change need not reconfirm the owner's consent, absent its knowledge of some subsequent event necessitating that it revisit the site's status.¹² In a recent decision, the Bureau held that when an applicant specifies the same site in two applications, the latter filing triggers an independent obligation to reconfirm reasonable assurance of site availability.¹³ However, MPR has cited no case, and we are not aware of any case, holding that an applicant has an obligation to monitor applications filed by third parties to ensure the continued viability of its site assurance.¹⁴

5. MPR's allegations that HCB knew of a site loss prior to June 2015 are unsupported and based entirely on speculation and surmise. Indeed, in light of MPR's acquisition from Matinee of KRTS and the tower on January 4, 2008,¹⁵ it is MPR's failure to have updated the antenna registration to name itself as the tower owner and to advise HCB of its decision not to make the tower available to it until filing its Petition to Deny over seven and a half years later that deprived HCB of information that would have caused it to revisit its site's status and file a Section 1.65 amendment.¹⁶

¹¹ MPR's claim that the *Staff Decision* failed to apply 47 CFR § 1.65 correctly is baseless. That rule requires an amendment when the information contained in the application is no longer substantially accurate and complete in all material respects. See 47 CFR § 1.65; see also 47 CFR § 1.17(a). However, as the Bureau correctly stated, an applicant cannot be disqualified under those rules without evidence of an intent to conceal the information from the Commission or violations so numerous and serious as to indicate irresponsibility. See *Staff Decision* at 4 (citing, *inter alia*, *David Ortiz Radio Corp. v. FCC*, 941 F.2d 1253, 1259 (D.C. Cir. 1991)). There is no basis for inferring an intent to deceive when there has been no showing that HCB knew prior to June 2015 that the proposed tower site was no longer available. MPR's continued reliance on the *Terry Keith Hammond* proceeding (AFR at 5) is misplaced, as that case involved substantial evidence of false certifications in multiple applications, including attempts to conceal unauthorized operations and a felony conviction. See *Terry Keith Hammond*, Order to Show Cause, 21 FCC Rcd 10267, 10273-77, paras. 15-24 (2006). In addition, we reject as erroneous MPR's claim that HCB submitted a site certification in Section VII of the HCB application (MPR Petition at 3) which became inaccurate "information already furnished in a pending application" (AFR at 4) under Section 1.65. FCC Form 340 does not include a site availability certification, in Section VII or elsewhere.

¹² See *Praise*, 13 FCC Rcd at 1270-71, paras. 2, 5 (rejecting speculation that an applicant must have realized its proposed site would no longer be available and a claimed continuing affirmative obligation to inquire into site availability). As for HCB's attempt (Opposition at 2, n.4) to invoke Section 73.239 of the rules, HCB has not provided the necessary factual foundation. The rule relates to licensees that do not allow others to share a site "peculiarly suitable for FM broadcasting," when no comparable site is available and exclusive use would unduly limit competition. See 47 CFR § 73.239. HCB has failed to provide any evidence to show that the rule applies to the facts at hand.

¹³ See *E-String Wireless, Ltd.*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, DA 16-37 at 5 n.32 (MB Jan. 13, 2016); see also Instructions to FCC Form 349, General Instructions at L.

¹⁴ In this case, MPR is attempting to create an obligation for HCB to monitor applications by other parties in or around Marfa, Texas, which is several hundred miles from HCB's headquarters. Moreover, we do not accept MPR's logical leap that acquisition of KRTS and its tower by MPR, if known to HCB, would necessarily indicate loss of site availability for HCB. Third-party leases of tower space are a common practice for broadcasters (particularly NCE broadcasters), and HCB had no way of knowing MPR's intentions regarding leases of space on this tower until MPR clarified those intentions in June of 2015.

¹⁵ Opposition to Petition to Deny, Att. D.

¹⁶ In its AFR, MPR claims that HCB also should have been on notice that MPR was about to acquire KRTS(FM) from Matinee because "that assignment was disclosed in the [MPR] application." AFR at 6; see also Reply at 3. However, the only such reference is in the application exhibit in which MPR claimed two diversity points because, "as of today" it held no other attributable broadcast interests, but obliquely pointed out "a pending assignment application under which the applicant would acquire the construction permit for a new FM as a donation." See File

(continued....)

6. ACCORDINGLY, IT IS ORDERED that the Application for Review filed by Marfa Public Radio, on December 17, 2015, IS DENIED, pursuant to Section 5(c)(5) of the Communications Act of 1934, as amended, and Section 1.115(g) of the Commission's Rules.¹⁷

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

(Continued from previous page) _____

No. BNPED-20071017AEC, Ex. 12. Because the exhibit did not identify that station as KRTS(FM), Matinee as the assignor, or provide that application file number, much less mention that the Marfa tower would be going to MPR with the station, the "disclosure" gave HCB no reason to question the continued viability of the consent previously provided to it by Matinee. Moreover, contrary to its commitment in that exhibit to "amend this application to withdraw this claim for diversity points" when the assignment to it had been approved and had closed, although the Bureau approved its acquisition of the station and the assignment was consummated on January 4, 2008, MBC failed to so amend, instead continuing to claim the diversity points. In 2010, the Commission disallowed MPR those points due to its failure to have provided proper documentation for its diversity claim, declaring MPR the comparative winner, three points to two. *Comparative Consideration of 26 Groups of Mutually Exclusive Applications*, Memorandum Opinion and Order, 25 FCC Rcd 11108, 11125-26 (2010).

¹⁷ 47 U.S.C. § 155(c)(5); 47 CFR §§ 1.115(g).

**STATEMENT OF
COMMISSIONER AJIT PAI**

Re: *NCE MX Group 430. Marfa Public Radio, Application for a Construction Permit for a New NCE-FM Station at Marfa, Texas, File No. BNPED-20071017AEC, Facility ID No. 174131; Houston Christian Broadcasters, Application for a Construction Permit for a New NCE-FM Station at Alpine, Texas, File No. BNPED-20071018AJM, Facility ID No. 173348.*

When Marfa Public Radio purchased a tower from Matinee Radio, LLC, it waited approximately seven years before updating the Commission's antenna structure registration system to reflect this transfer of control. It also waited seven years before informing Houston Christian Broadcasters that it had purchased the tower and was revoking Matinee's commitment to make the site available for Houston's new FM station in Alpine, Texas. Now, Marfa complains that Houston failed to notify the Commission within 30 days of Marfa's purchase of the tower that Houston no longer had assurance that the tower would be available to it. Really?¹

Needless to say, this Application for Review runs afoul of the "chutzpah doctrine."²

¹ Cf. *Really!?! with Seth and Amy, Saturday Night Live* (2007), available at <http://www.nbc.com/saturday-night-live/video/weekend-update-really/n12109>.

² See, e.g., *Illinois Public Safety Agency Network and Nextel Communications, Inc.*, WT Docket No. 02-55, Mediation No. TAM-12389, Memorandum Opinion and Order, 27 FCC Rcd 11459, 11468 (2012) (Statement of Commissioner Ajit Pai); *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures*, WT Docket No. 05-211, Order on Reconsideration of the Second Report and Order, 21 FCC Rcd 6703, 6709, para. 13 (2006); *Caribbean Shippers Assoc., Inc. v. Surface Transp. Bd.*, 145 F.3d 1362, 1365 n.3 (D.C. Cir. 1998).